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Supreme Court of the United States

OCTOBER TERM, 1948

Nos. 103, 104

FRANK LOBAIDO, *Petitioner,*

v.

THE PEOPLE OF THE STATE OF MICHIGAN.

PETITION FOR REHEARING OF ORDER DENYING PETITIONS FOR WRITS OF CERTIORARI.

Preliminary Statement.

In his petitions for writs of certiorari, petitioner urged as reasons for granting the writs that the judicial process of Michigan considered in its totality denied petitioner an essentially fair trial. Petitioner then argued in detail the elements of the essential unfairness. These seemed to counsel clearly to require granting the writs and therefore other substantial reasons controlling this Court's exercise of its discretionary certiorari jurisdiction were not presented. There are, therefore, substantial grounds available to petitioner although not previously presented, within Rule 33 of the rules of this Court.

The guidance in the rules of this Court respecting the appropriateness of certiorari to state courts appears in Rule 38, Paragraph 5(a), which provides:

> "A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
> "(a) Where a state court has decided *a federal question of substance not theretofore determined by this court*, or has decided it in a way probably not in accord with applicable decisions of this court." (Italics added)

The purpose of this petition is to show that sound judicial discretion dictates the granting of certiorari because (a) the Michigan courts have decided federal questions of substance not theretofore determined by this Court, Michigan's action on one question violating petitioner's rights under the Sixth Amendment as absorbed by the Fourteenth Amendment;[1] (b) other policy considerations show the need for the writs. This petition is submitted to present these substantial grounds available to petitioner although not previously presented, that a travesty on the administration of justice may not go uncorrected for want of complete presentation.

1. Michigan's denial of cross-examination is either expressly condemned by Alford v. United States, 282 U. S. 687, or such denial raises a federal question of substance not theretofore determined by this Court, and violates petitioner's right of cross-examination guaranteed by the Sixth Amendment as absorbed by the Fourteenth Amendment.

The facts of denial of cross-examination are documented in the petitions for certiorari herein (pp. 15, 18-21), but it

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[1] If *Alford* v. *United States*, 282 U. S. 687, is controlling here, then, as shown in the text herein in Point 1, Michigan's denial of cross-examination constitutes the decision of a federal question of substance in a way not in accord with an applicable decision of this Court—the alternative basis for granting certiorari.

was not shown this Court that such denial squarely conflicts with *Alford* v. *United States*, 282 U. S. 687. In that case this Court said:

> "Counsel often cannot know in advance what pertinent facts may be elicited on cross-examination. For that reason it is necessarily exploratory; and the rule that the examiner must indicate the purpose of his inquiry does not, in general, apply. Knapp v. Wing, 72 Vt. 334, 340, 47 A. 1075; Martin v. Elden, 32 Ohio St. 282, 289. *It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop.*" (p. 692, italics added).
>
> "* * * * The trial court cut off *in limine* all inquiry on a subject with respect to which the defense was entitled to a reasonable cross examination. This was an abuse of discretion and prejudicial error." (p. 694.)

In the case at bar, petitioner's trial counsel was cut off *in limine* on a subject that goes to the heart of the conviction herein. Thus, after the seven-year-old complainant had given the incredible testimony that she had not mentioned the alleged intercourse nor attempted murder at any time to her mother,[2] this was completely foreclosed as a field of inquiry:

> "Mr. Fitzpatrick (Petitioner's Trial Counsel): Why didn't you talk to your mother about that?
> Mr. O'Brien (Prosecuting Attorney): I object to that.
> Mr. Fitzpatrick: Why?
> The Court: Sustain the objection.
> Mr. Fitzpatrick: May I ask them to state on the record the basis of the objection.

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[2] The People had refused to endorse the mother as a material witness, and the trial court denied petitioner's motion that she be so endorsed (R. 2, 63-67).

> Mr. Shemanske (Assistant Prosecuting Attorney). The Court has sustained the objection. The Court don't need any explanation." (R. 99).

Precisely such foreclosure of cross-examination is directly condemned by *Alford* v. *United States, supra:*

> "* * * * The trial court cut off *in limine* all inquiry on a subject with respect to which the defense was entitled to a reasonable cross examination. This was an abuse of discretion and prejudicial error." (p. 694.)

The *Alford* case on its facts seems conclusive here. In that case the witness "was examined at great length" on other aspects of his testimony (282 U. S. at 691), just as was the witness in this case,[2a] but the proceedings were considered essentially unfair because the trial court cut off *in limine* certain proper cross-examination, just as the trial court did here. Indeed, the case at bar is *stronger* on its facts than the *Alford* case. There, the witness, although an important one, was not the *complainant,* as here. And, as noted from the above quotation from the record, trial counsel in the case at bar was even precluded from finding out *why* his entirely proper and essential cross-examination was stopped *in limine.*

It is true that the *Alford* case dealt with a federal prosecution, but the late Chief Justice (then Justice) Stone, in there condemning the foreclosure of cross-examination, used the very words that define the states' obligation under the Fourteenth Amendment—"*It is the essence of a fair trial* that reasonable latitude be given the cross-examiner * * * *" (282 U. S. at 692, italics added).

However, if the *Alford* case is deemed not controlling here, then Michigan's denial of cross-examination raises the following federal question of substance not determined by this Court: Is the right of confrontation guaranteed by the Sixth Amendment, in so far as it includes and pre-

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[2a] However, cross-examination of the witness in this case was seriously curtailed in additional vital matters. See Petitions for Certiorari, pp. 18-21.

scribes the right of cross-examination, absorbed by the Fourteenth Amendment?

The right of confrontation clearly includes and prescribes the right of cross-examination, *Kirby* v. *United States,* 174 U. S. 47, 55; *Dowdell* v. *United States,* 221 U. S. 325, 329-330; *People* v. *Hermes,* 73 Cal. App. (2d) 947, 168 P. (2d) 44, 48. Indeed, the right of cross-examination is of the essence of confrontation, for where there has been cross-examination at a previous trial or upon the taking of a deposition, the right of confrontation is deemed accorded thereby so that actual confrontation at the trial is not always necessitated by the Sixth Amendment. *Reynolds* v. *United States,* 98 U. S. 145, 161; *Mattox* v. *United States,* 156 U. S. 237, 242; cf. *West* v. *Louisiana,* 194 U. S. 258, 263.[3]

We sincerely urge that the right of confrontation, at least to the extent that it includes and prescribes cross-examination, must now be deemed absorbed by the Fourteenth Amendment, and this should be settled by this Court. Cf. *Snyder* v. *Massachusetts,* 291 U. S. 97, 106. Certainly in our system of adversary litigation of criminal responsibility, the right of cross-examination is as much a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental", *Snyder* v. *Massachusetts,* 291 U. S. 97, 105, and "of the very essence of a scheme of ordered liberty", *Palko* v. *State of Connecticut,* 302 U. S. 319, 325, as are other guarantees of the Bill

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[3] Note that *West* v. *Louisiana* merely decided that the use in a state trial of a deposition, under specified restrictions, where there had been *opportunity of cross-examination,* does not deny due process; *denial of cross-examination* was not involved. Nor does the Court's general statement, in that case, that the Sixth Amendment does not apply to proceedings in state court, control the case at bar today. As much has been said generally of the whole Bill of Rights; yet many of its specific provisions, none more important procedurally than the right of cross-examination, are now deemed absorbed by the Fourteenth Amendment. Contrast, for example, *Gaines* v. *Washington,* 277 U. S. 81, 85 and *Betts* v. *Brady,* 316 U. S. 455, 461-462, with *Snyder* v. *Massachusetts,* 291 'U. S. 97, 106.

of Rights already held or assumed by this Court to have been absorbed by the Fourteenth Amendment, for example, the right to counsel, *Powell* v. *Alabama*, 287 U. S. 45, 67-71; the prohibition of cruel and unusual punishments and double jeopardy, *Francis* v. *Resweber*, 329 U. S. 459, 462; the right of an accused to be informed of the accusation against him, see *Snyder* v. *Massachusetts*, 291 U. S. 97, 105; the right to a public trial and opportunity for defense, *In re Oliver*, 333 U. S. 257. At this very term, this Court has for decision whether the Fourth Amendment's guarantee against unreasonable searches and seizures has been absorbed by the Fourteenth Amendment. *Wolf* v. *Colorado*, cert. granted, April 26, 1948, 333 U. S. 879.

The instant case poses a constitutional question the importance of which *at least equals* any of the foregoing problems, and such question is squarely raised for this Court's decision:[4] Is the right of confrontation guaranteed by the Sixth Amendment, insofar as it includes and prescribes the right of cross-examination, absorbed by the Fourteenth Amendment?

2. Michigan's destruction of the scientific evidence raises a federal question of substance not theretofore determined by this Court.

The facts of such destruction, and the argument that due process was denied by the destruction of objective scientific evidence, probably conclusive, *before trial* and before opportunity of petitioner to examine and appraise it, are set forth in the petitions herein (pp. 10-15, 24-27), but petitioner did not point out that this raises an important federal question not determined by this Court, although the

[4] Denial of his right of cross-examination was expressly urged by petitioner in the Michigan court to be violative of his right to an essentially fair trial guaranteed by the federal Constitution (R. 103; petitioner's Brief in Support of Application for Leave to Appeal to Michigan Supreme Court, p. 1, included in certified transcript but not printed in this Court).

lower federal courts sustain petitioner's position. *Curtis* v. *Rives*, 123 F. (2d) 936, 938 (App. D. C.); *Hicks* v. *Hiatt*, 64 F. Supp. 238, 245-246 (D. C. Pa.). Neither petitioner nor respondent could cite a decision of this Court governing the situation. This is a most appropriate case in which to consider and decide such question. The frivolous excuse given for the destruction of the scientific evidence—that there was no room to keep it (Tr. 1765)—in the light of the retention of other bulky exhibits such as clothing and a large garbage can (Tr. 1906), inevitably implies deliberate suppression of the scientific evidence. But even assuming that such destruction was only negligent—and respondent concedes that "Destruction of such evidence may have been careless * * * *" (Brief Opposing Petition for Certiorari, p. 22)—an important federal question is raised for this Court. See Britt, Blood-Grouping Tests and the Law: The Problem of "Cultural Lag", 21 Minn. L. Review 671. Constantly increasing scientific knowledge and the resulting improvement in the administration of justice by its utilization in the judicial process, render it most important for this Court to consider and decide: Is a State free under the due process clause to destroy *before trial* scientific evidence of complete objectivity, probably conclusive, and thereby obtain a conviction which it likely could not obtain had the evidence not been destroyed?

3. Need for certiorari to clarify jurisdictional rules applicable to this Court's certiorari jurisdiction in Michigan cases.

Because the Supreme Court of Michigan in denying petitioner's application for leave to appeal entered only an order "that the application be and the same is hereby Denied" (R. 124), it was and is uncertain whether the petition to this Court should request that certiorari issue to the Supreme Court of Michigan or to the Recorder's Court for the City of Detroit, since it can not be known whether the Michigan Supreme Court's action constitutes an assump-

tion of jurisdiction and an affirmance, and hence a final reviewable judgment, or a refusal to take jurisdiction, leaving the trial court's decision the final reviewable judgment. Cf. *Western Union Tel. Co.* v. *Crovo,* 220 U. S. 364; *Norfolk & S. Turnpike Co.* v. *Virginia,* 225 U. S. 264; *Mathews* v. *Huwe,* 269 U. S. 262; *Myers* v. *International Trust Co.,* 273 U. S. 380; *Tumey* v. *Ohio,* 273 U. S. 510; *Western Union Tel. Co.* v. *Priester,* 276 U. S. 252; *Chesapeake & O. Ry. Co.* v. *Kuhn,* 284 U. S. 44.

Petitioner could find no case coming to this Court on certiorari from Michigan where Michigan's Supreme Court had denied application for leave to appeal, and apparently respondent also could not. Therefore petitioner felt constrained to petition for certiorari to both courts, since his election of the wrong court would have caused the time to lapse in respect of the correct court. Thus petitioner was put to the additional burden and expense of petitioning in respect of both courts and docketing two cases in this Court. This problem and burden will doubtless confront every future Michigan petitioner to this Court whose application for leave to appeal is denied by the Michigan Supreme Court, until the issue is settled by this Court. There is, therefore, this sound and independent policy reason, not heretofore presented in the petitions, for this Court's exercise of its certiorari jurisdiction to clarify this matter for future Michigan petitioners,[5] and those of all states with comparable appellate procedure.

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[5] Whether, when the Michigan Supreme Court denies appeal, its action or the trial court's action constitutes the final reviewable judgment, is a serious and difficult unanswered problem, and is not to be confused with the procedure for this Court's procurement of the record, which presents no problem since this Court can obtain a record from any court. Cf. *Department of Banking* v. *Pink,* 317 U. S. 264, 267; *Atherton* v. *Fowler,* 91 U. S. 143, 146.

Conclusion.

Thus there are substantial grounds justifying and requiring granting certiorari, which grounds, although available to petitioner, have not heretofore been presented to this Court.

It is sincerely urged that this is a case where the essential unfairness of the Michigan proceedings requires this Court to resolve all doubts it may have about the substantiality of such grounds in favor of granting the writs, whatever this Court's reluctance to interfere with State proceedings.

For to deny certiorari is to let stand a conviction carrying imprisonment that unquestionably will last for life (R. 2), based upon proceedings in a civil court in the United States of America, which did not accord the essentials of fairness even to the degree accorded by the Nazis to their minions in court martial proceedings—all in direct and flagrant violation of the Constitution of the United States.[6]

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[6] Petitioner's petitions for writs of certiorari documented the essential unfairness of the prosecuting officials (pp. 21-23), of the trial judge (pp. 23-24), and of the tribunal itself resulting from contamination of the jury (pp. 28-30) and under Rule 33 these cannot be reargued here. The petitions, however, did not point out, as they should have, that the police matron who procured the nylon stockings for the jurors was not, as in some jurisdictions, merely a court bailiff who might logically be assumed by jurors to be an officer of the court and hence a disinterested person, cf. 28 U. S. Code 755 (new), but rather an employee of the police department and naturally assumed by the jurors to be an agent of the prosecution (R. 108-111), just as the police were its agents in testifying for it (R. 17, 25, 29, 31, 42). The method of appointment and duties of police matrons in Michigan, as prescribed by statute, Mich. Stat. Ann. Secs. 5-3302-5.3308, make clear that such police matrons are not court-appointed bailiffs but agents of the police department.

Wherefore, it is respectfully urged that this petition for rehearing be granted, that the order denying certiorari be vacated, and that the petitions for writs of certiorari be granted.

Respectfully submitted,

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The foregoing petition for rehearing, filed under Rule 33 of the rules of this Court, is presented in good faith and not for delay, and is restricted to grounds specified in Paragraph 2 of said Rule.

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